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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>FRANK HILL THOMAS,<br><br>Defendant and Appellant. | H043734<br>(Santa Clara County<br>Super. Ct. No. 78748) |

Frank Hill Thomas appeals from an order of commitment, filed June 16, 2016, which extended his commitment for two years (January 23, 2015 to January 23, 2017) pursuant to Penal Code section 1026.5, subdivision (b)[1] (hereafter 1026.5(b)). That section governs a proceeding to extend the involuntary commitment of a person who has been found not guilty by reason of insanity (NGI).

In *People v. Thomas* (Dec. 10, 2015, H041855) [nonpub. opn.] (H041855), this court reversed the December 2, 2014 commitment order for the same two-year period because we found there was no substantial evidence that Thomas lacked the capacity to make a knowing and voluntary waiver of his statutory right to a jury trial on that date, which was when his counsel waived the right.[2] We remanded the matter for further proceedings in accordance with *People v. Tran* (2015) 61 Cal.4th 1160 (*Tran*).

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] By order filed on March 20, 2018, we granted Thomas's request that this court take judicial notice of our opinion in H041855. By order filed on August 21, 2018, we also granted the People's request that this court take judicial notice of the record and opinion in *People v. Thomas* (Apr. 14, 2014, H039417) [nonpub. opn.] (H039417).

The June 16, 2016 commitment order now being challenged was issued following a hearing upon remand. At the hearing upon remand, the People submitted additional evidence to show that Thomas lacked the capacity to make a knowing and voluntary waiver of his statutory right to a jury trial when his counsel waived the right on December 2, 2014.

In *Tran*, defense counsel had requested a bench trial for an NGI defendant. (*Tran*, *supra*, 61 Cal.4th at p. 1164.) The Supreme Court held that "the decision to waive a jury trial belongs to the NGI defendant in the first instance, and the trial court must elicit the waiver decision from the defendant on the record in a court proceeding." (*Id*. at p. 1167.) But the court also established that "if the trial court finds substantial evidence that the defendant lacks the capacity to make a knowing and voluntary waiver, then control of the waiver decision belongs to counsel, and the defendant may not override counsel's decision." (*Ibid*.) It stated that "[i]n this context, evidence is substantial when it raises a reasonable doubt about the defendant's capacity to make a knowing and voluntary waiver, and the trial court's finding of a reasonable doubt must appear on the record." (*Ibid*.) In *Tran*, the Supreme Court directed that the case be remanded "to the trial court so that the district attorney may submit evidence, if any, that Tran personally made a knowing and voluntary waiver *or* that he lacked the capacity to make a knowing and voluntary waiver at the time of counsel's waiver." (*Id*. at p. 1170, italics added.)

Based upon the expanded evidence before the trial court, we now conclude that the record supports the trial court's 2016 finding that Thomas lacked the capacity to make the jury waiver decision on December 2, 2014. Accordingly, the commitment order is affirmed.

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On our own motion, we also take judicial notice of the record in H041855. (See Evid. Code, §§ 452, subd. (d), 459.)

I

*Procedural History and Hearing on Remand*

Thomas was committed to a state hospital after being found NGI for a 1981 violation of section 288, subdivision (b). His commitment has been extended many times.

In H041855, Thomas challenged the December 2, 2014 order extending his commitment under section 1026.5, subdivision (b). Thomas argued among other things that he was improperly denied his right to a jury trial when his counsel waived a jury despite Thomas's explicit request for a jury trial unless the court accepted his conditional waiver. This court found that the record did not reflect that Thomas had made a knowing and voluntary personal waiver of his jury trial right. The opinion stated: "To the contrary, Thomas demonstrated his ability to make a knowing and voluntary waiver by presenting a 'deal' to the court, i.e., if the court were to order him to outpatient conditional release he would give up his right to a jury trial. However, when his attempted 'deal' was unsuccessful he asserted his right to a jury trial, which shows that he understood that a waiver would be of no benefit to him." In light of the California Supreme Court's twin decisions in *People v. Blackburn* (2015) 61 Cal.4th 1113 (*Blackburn*) and *Tran, supra*, 61 Cal.4th 1160, we reversed the judgment and remanded the matter to the trial court for further proceedings.

Upon remand, the trial court held a hearing on June 14, 2016. Thomas appeared by video conference from Napa State Hospital. Toward the beginning of the hearing, Thomas stated, "I'd like to leave. I'd like to leave right now. I'd like to go. I don't want to do this," and, "You don't have a jury trial." The court told Thomas, "[T]his is a hearing . . . to consider whether or not the waiver of a jury trial back in 2014 by your attorney was proper and appropriate," and, "I am trying to get evidence in the record at this point. I will invite you to give me your comments in a few minutes."

At the hearing, the trial court admitted three People's exhibits into evidence. A May 27, 2014 report issued by the Department of State Hospitals (May 2014 report) was admitted into evidence. The report indicated that Thomas had two diagnoses: schizophrenia (continuous and severe) and pedophilia. The report stated that his underlying felony offense had been committed on January 24, 1981 against a 10-year-old girl. Thomas had forced her at knifepoint to pull down her pants, he had fondled her vagina, and he had pulled down his own pants and forced her to masturbate him.

The May 2014 report stated that by reason of a mental defect, disease, or disorder, Thomas posed a substantial danger of physical harm to others and that Thomas had serious difficulty controlling his dangerous behavior. The diagnosis of schizophrenia was "based on [a] history of symptoms including paranoid and persecutory delusional thought process, inappropriate affect and disorganized thought process." At the time of the report, Thomas was 58 years old and a patient at Napa State Hospital. Thomas was being treated with medication "for psychosis and disorganized thought process."

The May 2014 report described incidents in 2013 and early 2014, during which Thomas was verbally aggressive or angry. It stated that Thomas continued to "harbor bitterness and strong resentment against his treating team and the whole hospital" and the "legal system in general." But the report noted that Thomas had not demonstrated direct physical aggression toward himself or others during the preceding year.

According to the May 2014 report, Thomas's psychiatric symptoms "persist[ed] as paranoid, persecutory and grandiose delusions, poor insight and judgment." Thomas talked, mumbled, smiled, and laughed to himself. He had poor social interaction and exhibited a dysphoric and irritable mood. He "continue[d] to manifest [a] disorganized thought process and delusions in the form of guarded behavior, based upon [his] strong anticipation [that] the whole system was against him." Thomas had repeatedly failed to cooperate with weight checks, blood draws, lab work, and the administration of his medication.

The May 2014 report disclosed that Thomas had limited insight into his mental illness and did not understand his potential for dangerousness due to mental illness. Thomas did not "recognize his personal triggers, warning signs and symptoms to decompensation." The report concluded that if he were released to the community, Thomas "would likely need considerable community support to maintain medication adherence."

The May 2014 report quoted from a CONREP report dated November 19, 2013. The CONREP report had found that Thomas was not ready for outpatient treatment in the community "due to his being 'floridly psychotic with loose rambling associations.' " According to that CONREP report, " 'Mr. Thomas [was] verbally aggressive and treatment non-compliant. He [did] not accept that he ha[d] a mental illness, denie[d] [that] he committed a sexual offense and insist[ed] that he is being held in NSH illegally through a conspiracy.' "

A "Declaration Regarding Patient's Refusal to Transport" was admitted into evidence. It indicated that on April 25, 2016, Thomas had refused to transfer from Napa State Hospital to the court. Thomas had stated, "I'm not going, they are not playing by the rules. I know my rights."

A May 10, 2016 report issued by the Department of State Hospitals (May 2016 report), which was prepared by Dr. Hasnain Maqsood, a staff psychiatrist, was admitted into evidence. The report indicated that Thomas was still being treated at Napa State Hospital and receiving psychotropic medications. It stated that Thomas was diagnosed with Schizophrenia (continuous) and pedophilia. The report stated that by reason of a mental defect, disease, or disorder, Thomas posed a substantial danger of physical harm to others and that Thomas had serious difficulty controlling his dangerous behavior.

According to the May 2016 report, Thomas had refused to go to his court hearing in April of 2016 because he wanted a "real" jury trial. It stated that Thomas was generally remaining isolated, that he had refused to attend sexual offender treatment, and

that he was not participating in any groups. Thomas occasionally became irritable and "cuss[ed] at the staff," and he sometimes refused his medical and dental appointments. The report indicated that Thomas had not been physically aggressive during the preceding year, but there had been incidents of verbal aggression. Thomas continued to "harbor bitterness and strong resentment against his treating team and the whole hospital" and the "legal system in general."

The report further stated that Thomas "remain[ed] delusional and disorganized." Thomas had a delusional belief that he was a security guard at the school, impliedly where the commitment offense occurred, and denied "touching any underage girl."[3] Thomas was unable to "hold a steady conversation with the staff and his treating psychiatrist."

According to the report, Thomas continued to have poor insight into his mental issues. He was unable to discuss the main symptoms of his mental illness or their present status. He did not understand his potential for dangerousness due to his mental illness and was "unable to identify precursors to [his] dangerous behaviors related to his mental illness." The report stated that if Thomas were released to the community, he "would likely need considerable community support to maintain medication adherence."

The May 2016 report quoted from a CONREP report dated June 17, 2015. That CONREP report had found, as had the November 2013 CONREP report, that Thomas was not ready for outpatient treatment in the community "due to his being 'floridly psychotic with loose rambling associations.' " According to the June 2015 CONREP report, " 'Mr. Thomas [was] verbally aggressive and treatment non-compliant. He d[id] not accept that he has a mental illness, denie[d] [that] he committed a sexual offense and insist[ed] that he is being held in NSH illegally through a conspiracy.' "

[3] Sometime prior to the offense, Thomas had worked as a security guard for a year and a half.

At the June 14, 2016 hearing, Thomas testified on his own behalf. He stated that he "just wanted a jury trial," he thought that "he deserved one," and it was his "right to have a jury trial." He said that he had wanted a jury trial "time and time again" but he "didn't get one." He thought that he "could rely on a jury to get out [of the hospital] because it was [his] only help to get out of the hospital."

Thomas's counsel asked him, "What was that trial going to be about?" The following exchange then took place between Thomas and his counsel:

"[Thomas:] It was going to be—about the program of the sex program. The sexual predators. That is the main— [¶ Q:] The trial was going to be about whether or not you're a sexual— [¶ Thomas:] Well, I think so. Insanity and the—yeah. [¶ Q:] Okay. [¶ Thomas:] Sexual predator. [¶ Q:] Was it going to be about what you were charged with initially? [¶ Thomas:] It could be anything they want it to be. Yes. [¶ Q:] So it could include—"

Thomas indicated that the trial could include anything and proceeded to give a rambling, semi-incoherent narrative.

Thomas's counsel then asked, "What do you think the jury was going to decide?" Thomas began his answer by saying, "I can't speak for the jury. I don't know. I don't know what they would decide. I don't know. I was hoping that they would see that I wasn't such a bad guy."

Thomas then gave a further off-point, semi-incoherent response. Among other things, Thomas said that he was a security guard, that he had lost his job for a little while, that he was at a neighbor's house borrowing money, and that he "wasn't even carrying a knife." He said that he did not know what was "going on when a lot of this was happening in the court." He said, "It kind of like shocked me. I don't know. It threw me."

Refocusing Thomas's attention on the matter at hand, his counsel asked, "What issue do you think the jury is supposed to decide?" Thomas replied, "I'm sorry. I can't

speak for a jury. I'm sorry. I can't speak for a jury what they would decide. I don't know." His counsel stated, "No. No. No. What issue do you think they would decide, not how would they decide. What issue are they deciding?" Thomas answered, "Whether or not I'd be a danger to myself or others."

Thomas's counsel asked him whether he knew the difference between a jury trial and a court trial. Thomas said yes. He indicated there could be "many differences" and said, "It [*sic*] could sway a jury on the behalf [*sic*] that they could feel that I was being kind of un—treated sort of unfairly by the DA or the hospital in such ways that it was not—unfair to my time." Thomas then drifted off-topic.

Thomas's counsel asked whether his jury trial would happen in federal or state court, Thomas said, "This court," and then, "State court." He said that he knew he deserved a jury trial, which was what he really wanted.

The trial court told Thomas, "First of all, let me clarify that the jury trial that we're talking about today is not about your original offense." Thomas responded, "I know that." The court explained to Thomas that the issue for trial was "whether or not you should stay in the state hospital or be released from the state hospital," and asked, "Do you understand that?" Thomas responded, "Yes, yes." The court then asked, "[I]s that what you want a jury trial about?" Thomas answered, "Yes, sir."

The court told Thomas that a report that it had received into evidence indicated that in May 2014, Thomas was "floridly psychotic with loose rambling associations," he was "verbally aggressive and treatment noncompliant," he did not "accept that he ha[d] a mental illnesses [*sic*]," he "denie[d] [that he had] committed a sexual offense," and "insist[ed] [that] he is being held in Napa State Hospital illegally through a conspiracy." The court asked Thomas whether the description of his state of mind in 2014 was accurate. Thomas responded, "I could have been upset and mad over not having a trial because I went into court expecting a trial several times. . . . [¶] I said I wanted a jury trial. And they didn't give it to me. . . ." When asked again whether the description of

his state of mind was accurate, Thomas indicated that he did not remember. Thomas made it very clear that he wanted a jury trial and that he believed it was his right to be tried by a jury.

Dr. Maqsood was called to testify. After the trial court expressly recognized that Dr. Maqsood was not Thomas's doctor in December 2014 (implicitly referring to the December 2, 2014 commitment hearing) and stated that it had read the doctor's report, the court asked whether Thomas "consistently had that same state of mind [described in the May 2014 report] . . . since that time." Dr. Maqsood's opinion was that Thomas had had the same state of mind. It was his further opinion that Thomas lacked "the capacity to make rational decisions with regard to the question of his legal defense."

Dr. Maqsood testified that Thomas had been under his care since December 2014, when he had joined Napa State Hospital as a staff psychiatrist. Before Dr. Maqsood took over Thomas's case, Thomas had "been under [treatment with] several different anti-psychotics." Dr. Maqsood stated that Thomas remained delusional, he did not admit or accept "responsibility for his instant offense," he did not "believe that the reports [were] true," and he believed that "his records were tampered [with] in the jail and by the Court." Dr. Maqsood also reported that despite encouragement, Thomas did not want to attend "the sexual offender treatment groups" and that Thomas had "poor insight into his mental health issues." Dr. Maqsood indicated that the foregoing features described Thomas's state of mind since he had taken over Thomas's case in December 2014.

On cross-examination, Dr. Maqsood elaborated on the reasons that he had concluded that Thomas lacked capacity. He testified that Thomas did not understand the nature and seriousness of his mental health issues or his need to be on medication. Thomas had refused a referral to a neurologist to address a medication side effect, and he had refused dental appointments. Dr. Maqsood had wanted Thomas to begin a different medication, but that medication required regular blood work and Thomas was so noncompliant with blood work that it could not be done. Thomas's mental illnesses were

"chronic." Thomas had become more aggressive and irritable with the staff in the previous several months, and Dr. Maqsood had prescribed an additional dose of medication in the morning.

On further cross-examination, Dr. Maqsood stated that Thomas believed that his court papers had been manipulated and changed. He testified that Thomas did not believe that he had committed a sexual offense.

Dr. Maqsood indicated that Thomas wanted a jury trial and believed that the jury would be on his side and would decide in his favor. Thomas had told Dr. Maqsood that he did not want to go to court unless he was having a jury trial and that was what he "firmly believe[d]" he needed. When reminded by Dr. Maqsood that he had a court date, Thomas had brought up his right to have a jury trial on his own.

The commitment order filed June 16, 2016 reflected that the trial court had heard the testimony of Dr. Maqsood, who had been Thomas's treating doctor since December 2014, had reviewed reports submitted by the Department of State Hospitals, and had observed Thomas's conduct. The court found that there was "substantial evidence in the record that [Thomas] lacked the capacity to make a knowing and voluntary waiver of his right to a jury trial in December [of] 2014." The court then found beyond a reasonable doubt that "by reason of mental disease, defect or disorder," Thomas continued to represent "a substantial danger of physical harm to others" and continued to be "a person described" in section 1026.5, subdivision (b)(1).

## II

## *Discussion*

### A. *The Law Governing Extended Commitments Under Section 1026.5*

An NGI defendant's commitment may be extended if he or she poses "a substantial danger of physical harm to others" "by reason of a mental disease, defect, or disorder." (§ 1026.5, subd. (b)(1).) Under the mandated statutory procedure for such extended commitment, the trial court is required to "advise the person named in the

petition of the right to be represented by an attorney and of the right to a jury trial." (§ 1026.5, subd. (b)(3).) The statute dictates that "[t]he trial shall be by jury unless waived by both the person and the prosecuting attorney." (§ 1026.5, subd. (b)(4).)

B. *The 2015 Decisions of Blackburn and Tran*

In two companion cases involving proceedings to extend an involuntary commitment, *Blackburn* and *Tran*, the California Supreme Court considered analogous statutory provisions that required a trial court to advise the proposed committee of the right to a jury trial and obtain his or her personal waiver of the right. *Blackburn* involved a petition to extend the commitment of a mentally disordered offender (MDO), and *Tran* involved a petition to extend the commitment of an NGI defendant. In both cases, the Supreme Court determined that the waiver decision belongs to the proposed committee in the first instance. (*Blackburn*, *supra*, 61 Cal.4th at p. 1127; *Tran*, *supra*, 61 Cal.4th at p. 1167.) In those cases, the court also concluded that a trial court's acceptance of an invalid jury trial waiver requires automatic reversal. (*Tran*, *supra*, at p. 1169 ["a trial court's acceptance of an invalid jury trial waiver under section 1026.5(b)(4) . . . is not susceptible to ordinary harmless error analysis and automatically requires reversal"]; see *Blackburn*, *supra*, at p. 1136 ["when a trial court errs in completely denying an MDO defendant the right to a jury trial under section 2972(a), the error requires automatic reversal"].)

In both *Blackburn* and *Tran*, the Supreme Court set out the proper trial court procedure with respect to a statutory right to a jury trial. In *Blackburn*, the Supreme Court stated that "the trial court must advise the MDO defendant personally of his or her right to a jury trial and, before holding a bench trial, must obtain a personal waiver of that right from the defendant unless the court finds substantial evidence—that is, evidence sufficient to raise a reasonable doubt—that the defendant lacks the capacity to make a knowing and voluntary waiver, in which case defense counsel controls the waiver decision." (*Blackburn*, *supra*, 61 Cal.4th at p. 1116.) It also explained that "evidence is

substantial when it raises a reasonable doubt about the defendant's capacity to make a knowing and voluntary waiver . . . ." (*Id*. at p. 1130.) The Supreme Court made clear that once "the trial court finds substantial evidence that the defendant lacks the capacity to make a knowing and voluntary waiver, then control of the waiver decision belongs to counsel." (*Ibid*.) In *Tran*, the Supreme Court held that parallel language in the NGI statute (see § 1026.5, subds. (b)(3) & (b)(4)) has the same meaning and construction. (See *Tran*, *supra*, 61 Cal.4th at pp. 1163, 1167.) Thus, an NGI defendant may not override his or her counsel's jury waiver if the trial court finds the evidence sufficient to *raise a reasonable doubt* about his or her capacity to make a knowing and voluntary waiver decision. (*Ibid*.)

C. *Proposed Committee's Capacity to Make Waiver Decision*

In *Tran*, the California Supreme Court "presume[d] the Legislature was aware that many NGI defendants lack the capacity to make a knowing and voluntary waiver of their right to a jury trial, and [it] did not intend courts to obtain a jury trial waiver from such persons." (*Tran*, *supra*, 61 Cal.4th 1167.) But the Supreme Court did not agree that "courts can infer that nearly every NGI defendant in a commitment extension proceeding lacks the capacity to make a knowing and voluntary waiver from the preliminary showing that must accompany an extension petition. (See § 1026.5, subd. (b)(2).)" (*Ibid*.) Similarly, the Supreme Court in *Blackburn* rejected the contention that courts "can infer that nearly every defendant in an MDO commitment extension proceeding lacks the capacity to make a knowing and voluntary waiver from the preliminary showing required for the district attorney to file an extension petition. [Citation.]" (*Blackburn*, *supra*, 61 Cal.4th at p. 1128.)

Both *Blackburn* and *Tran* observed that in each case the proposed committee necessarily had been previously found competent to stand trial.[4] (See *Blackburn*, *supra*,

[4] The test of a defendant's competence to stand trial is whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational and factual understanding of the proceeding

61 Cal.4th at p. 1129 ["By definition, every mentally disordered offender has previously been deemed competent to stand trial, and the premise of the MDO statute is that severe mental disorders are 'treatable.' [Citations.] . . . The potentially transitory and treatable nature of mental illness and the potentially limited areas of functioning impaired by such illness preclude any categorical inference that an MDO defendant facing a commitment extension proceeding cannot competently decide whether to waive a jury trial"]; *Tran*, *supra*, 61 Cal.4th at p. 1167 ["any person found 'insane at the time the offense was committed' is necessarily a person previously deemed competent to stand trial (§ 1026, subd. (a)), and the entire premise of the NGI commitment scheme is that the defendant's mental disease, defect, or disorder is treatable (§ 1026.5, subd. (b)(11)) and that the defendant's sanity may be 'recovered fully' (§ 1026, subd. (a)) or 'restored' (§ 1026.2, subd. (a))"].) As the Supreme Court observed in *Blackburn*, "the conditions that result from a mental illness or related disorder, 'though they include imminent dangerousness, do not necessarily imply incompetence or a reduced ability to understand, and make decisions about, the conduct of the proceedings.' [Citations.]" (*Blackburn*, *supra*, at pp. 128-1129.)

We note that the issue is a defendant's *capacity* to make a knowing and voluntary waiver of the right to a jury trial, not his or her preexisting understanding of the meaning of a jury trial and the consequences of any waiver. "The purpose of an advisement is to inform the defendant of a particular right so that he or she can make an informed choice about whether to waive that right. [Citations.] If the Legislature had intended to allow counsel to waive a jury trial notwithstanding the defendant's wishes, it would not have needed to require the trial court to expressly advise the defendant. . . [T]he purpose of

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against him. (*Dusky v. United States* (1960) 362 U.S. 402 (*per curiam*).) It is not enough that a defendant is oriented to time and place and has some recollection of events. (*Ibid*.) "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." (*Drope v. Missouri* (1975) 420 U.S. 162, 171.)

the mandatory advisement is 'to inform the [proposed committee] of the right to a jury trial so that he or she can decide whether to waive it.' " (*Blackburn, supra*, 61 Cal.4th at p. 1125.)

D. *Analysis*

In our view, the question of Thomas's capacity to make the waiver decision was a close question. The determination was all the more difficult because it was being made retrospectively.

As the United States Supreme Court has recognized, "[m]ental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." (*Indiana v. Edwards* (2008) 554 U.S. 164, 175 (*Edwards*).)

The California Supreme Court has similarly recognized that " ' "mental illness 'often strikes only limited areas of functioning, leaving other areas unimpaired, and consequently . . . *many mentally ill persons retain the capacity to function in a competent manner*.' " ' (*In re Qawi* (2004) 32 Cal.4th 1, 17.)" (*People v. Barrett* (2012) 54 Cal.4th 1081, 1109.) " ' "Competence is not a clinical, medical, or psychiatric concept. It does not derive from our understanding of health, sickness, treatment, or persons as patients. Rather, it relates to the world of law, to society's interest in deciding whether an individual should have certain rights (and obligations) relating to person, property and relationships." ' [Citation.]" (*In re Qawi, supra*, at p. 17.) Not all mentally ill persons facing involuntary commitment have intellectual or cognitive impairments that would prevent them from having the capacity to make the decision regarding whether to waive a jury trial. The court has "observed that many persons who suffer from mental illness or related disorders can understand the nature of legal proceedings and determine their own best interests." (*Blackburn, supra*, 61 Cal.4th at p. 1128.)

The competence or capacity required to waive a right may depend upon the particular circumstances and the right being waived. In the context of a criminal

prosecution, the United States Supreme Court has held that the competency standard for pleading guilty or waiving the right to counsel is not higher than the competency standard for standing trial. (*Godinez v. Moran* (1993) 509 U.S. 389, 391 (*Godinez*).) In the *Godinez* case, "a borderline-competent criminal defendant . . . asked a state trial court to permit him to represent himself and to change his pleas from not guilty to guilty." (*Edwards, supra,* 554 U.S. at p. 171.) As the Supreme Court later observed, defendant Godinez's "ability to conduct a defense at trial was expressly not at issue." (*Id.* at p. 173.)

In *Godinez*, there was "no reason to believe that the [defendant's] decision to waive counsel require[d] an appreciably higher level of mental functioning than the decision to waive other constitutional rights." (*Godinez, supra,* 509 U.S. at p. 399.) The court observed that "while '[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts,' [citation] a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." (*Id.* at p. 400, fn. omitted.) Therefore, "even assuming that self-representation might pose special trial-related difficulties, 'the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.' [Citation.] For this reason, [the Supreme Court in *Godinez*] concluded, 'the defendant's "technical legal knowledge" was "not relevant" to the determination.' [Citation.]"[5] (*Edwards, supra,* 554 U.S. at p. 172.)

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[5] In the later case of *Edwards*, the United States Supreme Court determined that the United States Constitution "permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Edwards, supra*, 554 U.S. at p. 178.) The court believed that the nature of mental illness "caution[ed] against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself." (*Id.* at p. 175.) It observed that "an individual may well be able to satisfy *Dusky*'s mental

Similarly, we do not think that a proposed committee's technical legal knowledge or ability to conduct a defense is relevant to whether he or she has the capacity to knowingly and voluntarily waive the statutory right to a jury trial under section 1026.5, subdivision (b). Thus, the determination whether Thomas had the capacity to make a knowing and voluntary waiver decision did not turn on whether a jury trial would be a good or efficacious legal decision for his defense.

With respect to criminal defendants' constitutional right to be tried by a jury, the United States Supreme Court has stated: "The purpose of the jury trial . . . is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' [Citation.] Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." (*Williams v. Florida* (1970) 399 U.S. 78, 100.) The statutory right to a jury trial serves the same purpose of being a safeguard against oppressive government action.

In this case, Thomas apparently had a paranoid belief that the government was conspiring against him and harbored an unrealistic hope that a jury trial would lead to his release from the hospital. But given the purpose of a jury trial, we cannot say that Thomas was necessarily irrational in thinking that a jury trial, rather than a court trial, would be a better protection against any governmental overreaching. Thomas seemed to understand at the hearing on remand that he could not predict the outcome of a jury trial. On the other hand, Thomas seemed confused about the scope of the jury's decision and the limits of its power.

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competence standard [to stand trial], for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel. [Citations.]" (*Id*. at pp. 175-176.)

In any event, as the reviewing court, we must apply the deferential substantial evidence standard, viewing the record in the light most favorable to the trial court's determination that Thomas lacked the requisite capacity to make the waiver decision. (Cf. *People v. Mendoza* (2016) 62 Cal.4th 856, 871-872 (*Mendoza*); *In re R.V.* (2015) 61 Cal.4th 181, 199 (*R.V.*); *People v. Johnson* (1980) 26 Cal.3d 557, 562, 576.) We may not substitute our judgment for the trier of fact's finding if it was supported by substantial evidence. (Cf. *Mendoza*, *supra*, at p. 883.) A reviewing court cannot reverse an order or judgment simply because the circumstances might also be reasonably reconciled with a contrary finding. (Cf. *People v. Valdez* (2004) 32 Cal.4th 73, 104.)

The trial court could reasonably infer from the evidence of Thomas's chronic, severe mental illness that on December 2, 2014, Thomas lacked the capacity to make knowing and voluntary jury waiver decision given his ongoing schizophrenia, delusions, florid psychosis, and disorganized thinking, all of which interfered with rational understanding. The trial court's determination that Thomas lacked the capacity to make the waiver decision was also informed by its own observations of him, and its perceptions are entitled to some deference. (See *R.V.*, *supra*, 61 Cal.4th at p. 199; see also *Blackburn*, *supra*, 61 Cal.4th at p. 1131.) Although Thomas adamantly and consistently requested a jury trial at the proceedings for an extended commitment, the resoluteness of his request was not determinative of whether he had the capacity to make the jury trial waiver decision. (See *People v. Daniels* (2017) 3 Cal.5th 961, 995 (lead opn. of Cuellar, J.) [declining "to conflate a knowing, intelligent waiver [of a jury trial] with an emphatic one"].)

Under the proper standard of review, the evidence was sufficient to support the trial court's finding that there was substantial evidence that Thomas lacked the capacity—that is, evidence sufficient to raise a reasonable doubt about his capacity to

make a knowing and voluntary jury waiver decision on December 2, 2014.[6] (See *Tran*, *supra*, 61 Cal.4th at pp. 1163, 1167.)

DISPOSITION

We affirm the June 16, 2016 commitment order.

[6] Further, we reject Thomas's assertion that a denial of his statutory right to a jury trial violated his federal due process rights. The United States Supreme Court has "long recognized that a 'mere error of state law' is not a denial of due process. *Gryger v. Burke*, 334 U.S. 728, 731 (1948)." (*Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21; see *Rivera v. Illinois* (2009) 556 U.S. 148, 158.)

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

*People v. Thomas*
H043734